

No. _____

IN THE
SUPREME COURT FOR THE UNITED STATES OF AMERICA

KEITH SCHWARTZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of
Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether at the outset of a jury trial, the trial judge's instructions to the jury that the defendant has prior felony convictions and had engaged in other bad acts and misconduct warranted reversal of the convictions?
2. Whether the common law evidentiary rule of "res gestae" can override consideration of the Federal Rules of Evidence, notably F.R.E. Rules 403 and 404?
3. In a criminal case involving prescription medications, does a trial court have a duty to determine which prescriptions were illegal and which were not in calculating the appropriate Guideline for sentencing purposes?

PARTIES TO THE PROCEEDINGS

The Petitioner is an individual and American citizen.

The Respondent is the government of the United States of America.

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REASONS FOR GRANTING THE PETITION

A number of reasons exist for the grant of this Petition, which are elaborated upon in detail below.

This case presents novel issues involving erroneous instructions to a jury provided by a judge at the outset of a jury trial, which exposed the jury to extraneous information in the case, violating the Defendant-Petitioner's right to be presumed innocent and a fair consideration by the jury. A writ of certiorari in exercise of this Court's supervisory power is necessary to correct and harmonize a discrepancy in the standards applied within and outside the Tenth Circuit Court of Appeals as to how to handle this type of interference with the jury in federal criminal trials.

The second and third issues raise important issues regarding proper application of the Federal Rules of Evidence in criminal trials. In particular, Petitioner claims examination by this Court is necessary to bring greater guidance to lower courts when contrasting the Rules of Evidence with arcane rules extracted from the common law, in this case, the "*res gestae*" rule. Rules such as the *res gestae* rule overcome proper analysis required by the rules of evidence and thereby impair the truth-seeking function and pursuit of justice by lower courts. Accordingly, an important federal question is

presented by this case.

Lastly, a writ of certiorari is requested to provide lower court with proper guidance in application of the Sentencing Guidelines in this period of opioid crisis in our country so that the lower courts are required to evaluate and discern the difference between proper medical administration of opioids to combat chronic pain versus improper and illegal administration of opioids that simply foster improper addiction.

OPINIONS BELOW

The judgment of the district court is attached as Appendix 1. The unreported court of appeals opinion and judgment is attached as Appendix 2 and appears at 2017 U.S. App. Lexis 13810. The order denying the petition for rehearing is attached as Appendix 3.

JURISDICTION

Jurisdiction is invoked upon U.S. Supreme Court Rule 11, and 28 U.S.C. §1254 based upon the following record: a 61-count indictment was filed May 22, 2014 against the Petitioner, Keith Schwartz, Dr. Joseph Ferrara, the Petitioner's wife, Lauren Schwartz, Karyne Smith, Karen Plaia, and Melissa Toothman. Ms. Schwartz, Ms. Smith and Ms. Plaia were employees of a pain clinic operated by Dr. Ferrara and Petitioner. During the

pre-trial proceedings Ms. Schwartz, Ms. Smith and Ms. Plaia entered into plea agreements with the government. Shortly thereafter, on April 15, 2014, Dr. Ferrara committed suicide (CF p. 225-226 (Doc. 248)).

On October 23, 2015, a jury convicted Mr. Schwartz on counts 1, 7-9, 12-14, 16, 20-55. Multiple convictions entered for conspiracy to distribute controlled substances outside the usual course of a professional practice for other than a lawful medical purpose, intentional and illegal use of a communication facility, money laundering and conspiracy to money launder. On April 29, 2015, the trial court sentenced the Defendant to 180 months in the Bureau of Prisons.

On May 5, 2015, the Appellant filed a notice of appeal. After briefing and oral argument held on September 20, 2016, the Tenth Circuit Court of Appeals issued its judgment affirming the trial court on July 31, 2017. Mr. Schwartz filed a Petition for Rehearing, which the court denied on September 11, 2017.

STATEMENT ELABORATING REASONS FOR THE WRIT

Brief Factual Background of the Case.

Mr. Schwartz was operating a medical marijuana business called Urgent Herbal Care in Colorado with a doctor named Dr. Joseph Ferrara, who wrote the medical marijuana prescriptions for Urgent Herbal Care (v3, p1589)(tr. 10/16/14). Subsequently, Mr. Schwartz purchased a defunct pain management practice from a Dr. Clemmer, who had legal problems from writing prescription pain medications. Mr. Schwartz wanted to grow his business and have Dr. Ferrara write prescriptions for Dr. Clemmer's old patients (v3, p1589)(tr. 10/16/14).

Mr. Schwartz organized the business while Dr. Ferrara consulted with Dr. Clemmer's patients (v3, p1596-97)(tr. 10/16/14). Mr. Schwartz did not see any patients. The first day when Dr. Ferrara began seeing Dr. Clemmer's patients occurred on May 31, 2013 at a Holiday Inn conference room at I-70 and Wadsworth. Ms. Smith, an office manager, was in one room gathering patients' information while Dr. Joseph Ferrara was in another room seeing the patients (v3, p647) (tr. 10/8/14). The prospective patients were supposed to bring six months of prescription and medical records (v3, p649) (tr. 10/8/14). Mr. Schwartz

was not present at the Holiday Inn, but Ms. Smith communicated with him by telephone (v3, p651)(tr. 10/8/14). Ms. Smith remembered that things were very frantic that day with the former patients of Dr. Clemmer.

Ms. Schwartz advised Ms. Smith how to set up the patient files for Dr. Ferrara (v3, p656)(tr. 10/8/14). She was to set up a patient packet, an opiate agreement, a pain management contract, and an agreement put on video that the patients would agree not to abuse their medication, sell it, or ask for early refills (v3, p656-657)(tr. 10/8/14). The prescriptions were only to last two weeks to prevent abuse. The protocols were put into place to prevent abuse and to protect the clinic (v3, p658-659)(tr. 10/8/14). They would also run Prescription Drug Monitoring Program or “PDMP” reports to make sure that the people were not abusing their prescriptions (v3, p663)(tr. 10/8/14). They did not have many charts on the patients in the beginning, because many of Dr. Clemmer’s records had been seized (v3, p661)(tr. 10/8/14).

Mr. Schwartz wrote emails to Ms. Smith and Dr. Ferrara to make sure they kept good records and did not get in trouble (v3, p724)(tr. 10/9/14). Part of that process was plugging the data into a software

program called, “Advanced MD” (v3, p724)(tr. 10/9/14). Mr. Schwartz advised Dr. Ferrara to consult with another doctor named Kessler for a second opinion and to be sure they complied with the rules (v3, p725-726)(tr. 10/9/14). Ms. Smith would give daily summaries on the business of the clinic to Mr. Schwartz (v3, p726-727)(tr. 10/9/14). In emails, Mr. Schwartz told Ms. Smith, her job was to keep records straight and organized so that the doctor could only see the patients, “Anything you feel should be reported to the authorities should be. We should be the tightest ship” (v3, p724)(tr. 10/9/14).

While under the care of the pain clinic, two patients, “PB” and “CL,” died (v3, p742)(tr. 10/9/14). Mr. Schwartz wanted to be sure they had all the right records to show they had been treating them properly (v3, p743)(tr. 10/9/14).

According to Ms. Smith, Dr. Ferrara was very professional and would spend over an hour with every new patient (v3, 822)(tr. 10/9/14). The doctor took classes, obtained a certificate in pain management, and was a member of the American Pain Academy (v3, p847)(tr. 10/9/14). They had a plaque warning patients about checking their records through PDMP (v3, p827)(tr. 10/9/14). They scanned all records into

Advanced MD (v3, p829)(tr. 10/9/14). They made sure things were done legally (v3, p834)(tr. 10/9/14). Mr. Schwartz wanted to know when anything questionable happened (v3, p845)(tr. 10/9/14).

The government called two expert physician witnesses, who testified the pain practice was not within outside the usual course of a professional practice, and the prescriptions were written for other than a lawful medical purpose. The first was Dr. Philip Engen, who practices pain management in Wheat Ridge, Colorado (v3, p976)(tr. 10/10/14). Dr. Engen is a certified pain management specialist (v3, p976-978)(tr. 10/10/14). He was offered and accepted by the court as an expert in pain management, anesthesiology, opioid prescription practices and substance abuse disorders (v3, p983-986)(tr. 10/10/14). Dr. Engen testified there were 285 opiate overdose deaths in Colorado in 2012 (v3, p981)(tr. 10/10/14). Opioids treat bipolar affective disorder and are used to treat pain as well (v3, p988-990)(tr. 10/10/14). Common opioids include Oxycodone, Fentanyl, and Morphine (v3, p991)(tr. 10/10/14).

Dr. Engen was asked to review the case because of the “patient deaths” (v3, p1007)(tr. 10/10/14). He said Dr. Ferrara wrote prescriptions from prior prescription records because he had no records

and it is unprofessional for a doctor to write prescriptions without a physical evaluation and history (v3, p1015-17)(tr. 10/10/14). The DEA had seized Dr. Clemmer's records (v3, p1276)(tr. 10/14/14). Dr. Engen opined that Dr. Ferrara was not in compliance because he did not obtain "informed consent" (v3, p1021)(tr. 10/10/14). Dr. Engen opined that a non-physician may not own a medical practice (v3, p992)(tr. 10/10/14).¹

Specifically, Dr. Engen reviewed the records of prescriptions for Dr. Ferrara from the PDMP, which indicated 500,000 doses were written over an eighteen-month period from May 2011 to December 2012 (v3, p1029)(tr. 10/10/14). 500,000 was very high to Dr. Engen (v3, p1049)(tr. 10/10/14). Dr. Engen only reviewed the actual medical records of three of Dr. Ferrara's patients, "CL", "PB" and "RE" (v3, p1030, 1217)(tr. 10/10, 14/14). He also reviewed an "undercover" patient's records (v3, p1036)(tr. 10/10/14). All of the doctor's opinions about the prescription of drugs being outside the scope of a professional

¹ This opinion is questionable under the law. Corporations consisting of non-physicians may own medical practices as long as they exert no control over a doctor's independent judgment in their employ. See discussion in *Daly v. Aspen Center for Women's Health*, 134 P.3d 450, 452-453 (Colo. App. 2005); *Estate of Harper v. Denver Health and Hospital Authority*, 140 P.3d 273, 275-276 (Colo. App. 2006).

practice were based upon these three patients-he reviewed no records of any of the hundreds of other patients treated (v3, p1217)(tr. 10/14/14).

The doctor testified he was trying to determine how the “deaths” of those patients could have been “prevented” (v3, p1030)(tr. 10/10/14).

While he discussed the deceased patients’ histories of treatment at length, Doctor Engen stated the prescription of drugs did not cause the death of any of the patients and that in particular PB’s autopsy showed “levels consistent with appropriate use” (v3, p1030-1035)(tr. 10/10/14).

On July 11, 2014, the government filed a motion to amend count one of the indictment to delete the language stating “and death resulted from the use of such substances.” (v1, p428-437)(Doc. 269). The original “resulting in death” language would have elevated the minimum mandatory penalty for a conviction to twenty years. In its motion, the government stated that its medical expert (Dr. Peter Buttrick) could not opine that the death of a patient, “P.B.,” resulted from her ingestion of oxycodone and methadone (v1, p434). However, the government maintained that all evidences of deaths were still probative in its case (v1, p436).

Dr. Engen opined that the treatment that was outside the scope of the usual professional practice was “caused by the way the business was run” (v3,

p1034-36)(tr. 10/10/14). Dr. Engen stated the records showed that patients all over Colorado were at risk because of “missteps” in trying to help a patient (v3, p1037)(tr. 10/10/14). He clarified that although most of what he reviewed came from the PDMP, the PDMP does not form the basis of any “misstep” in treatment. Dr. Engen summarized his testimony by stating the Defendant had a role in the entire practice being outside the course of a usual practice by the way the business was purchased, the way he organized the records to make them look good, by Dr. Ferrara not being able to provide safe medications or informed consent, and by the amount of money Mr. Schwartz made, and his role in “firing patients” (v3, p1062)(tr. 10/10/14). On cross-examination, the doctor acknowledged that the guidelines in place in 2011 did not emphasize the roll of obtaining informed consent in the prescription practice (v3, p1220)(tr. 10/14/14). Dr. Engen stated despite being unable to opine that the medications caused death, he stated the treatment of CL, PB and RE had “red flags” that “led” to their “morbidity” (v3, p1062)(tr. 10/10/14).

Dr. Mark Walter is a psychiatrist from Wyoming (v3, p1329)(tr. 10/15/14), who finished his residency in 2006 (v3, p1330)(tr. 10/15/14). Dr. Walter was offered as an expert and accepted by the court in

addiction psychiatry (v3, p1333)(tr. 10/15/14). He reviewed patient charts and transcripts of six or seven of Dr. Ferrara's patients (v3, p1337-38)(tr. 10/15/14). He had to do a global assessment-there were too many constraints to look at Dr. Ferrara's entire caseload (v3, p1345)(tr. 10/15/14). He stated erroneously that Dr. Ferrara had no training in pain management (v3, p1346)(tr. 10/15/14). Dr. Walter stated, as a general rule, psychiatrists like him do not engage in pain management (v3, p1347)(tr. 10/15/14). He did a little pain management in medical school (v3, p1432)(tr. 10/15/14), and never has had a medical office (v3, p1430)(tr. 10/15/14). Dr. Walter opined the prescription of medication for the undercover agent was below "the standard of care" (v3, p1361)(tr. 10/15/14). Dr. Walter is not licensed to practice medicine in Colorado (v3, p1436-37)(tr. 10/15/14). The DEA supplied him with materials, which included no information about Dr. Ferrara's OBGYN practice and pain management credentials (v3, p1455)(tr. 10/15/14).

Dr. Walter opined that Dr. Ferrara's examinations were grossly deficient, and his treatment of PB was below the "standard of care" and outside the course of usual practice (v3, p1379-81, 1393)(tr. 10/15/14). Dr. Walter testified at length about "PB" (v3, p1388-93)(tr. 10/15/14).

Dr. Walter also discussed Dr. Clemmer's treatment of "JB," a patient of Dr. Clemmer's. "JB," was in treatment with Dr. Clemmer when "JB" ended up in the ICU for sucking on a patch of Fentanyl (v3, p1394-99)(tr. 10/15/14). Subsequently, when Dr. Ferrara saw JB, he did not prescribe JB Fentanyl (v3, p1403)(tr. 10/15/14), and had written on his notes get patient into "detox" (v3, p1407)(tr. 10/15/14). Apparently, "JB" was the wife of "PB" (v3, p1410-11)(tr. 10/15/14). Dr. Walter opined Dr. Ferrara's treatment of JB was not for a legitimate medical purpose and outside the course of a usual professional practice (v3, p1411-13)(tr. 10/15/14).

Brief Background of the Proceedings-Improper Instructions.

Voir dire in this case concluded on the morning of October 7, 2014 at 10:17 a.m. (v2, p314)(sealed tr. 10/7/14, at p45). During the recess, the jury was given written instructions. The court was in recess from 10:20 to 10:49 a.m. when the case was called (v3, p314)(tr. 10/7/14). At the time the case was called, the court stated, "[y]ou have been presented with copies of the jury instructions and also materials to write and take notes. The jury instructions are yours to keep."

After reconvening the court began reading many pages of the

instructions out loud, finally arriving at instruction number sixteen, “[y]ou have heard evidence that Keith Schwartz---this should not be in here. Is that correct? (v3, p348)(tr. 10/7/14). The court directed the clerk to remove the paper copies of instruction number 16. Apparently, the proposed stipulated instruction number sixteen read:

You have heard evidence that Keith Schwartz has been convicted of a felony, that is, a crime punishable by imprisonment for a term of years. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the testimony you will believe in this trial. The fact that Keith Schwartz has been convicted of another crime does not mean he committed the crime charged in this case, and you must not use his prior conviction as proof of the crime charged in this case. You may only find him guilty of the crime charged here only if the government has proved it beyond a reasonable doubt.

(v1, p653).

Shortly thereafter, as the court continued reading the instruction packet out loud, it stated: “[y]ou will hear evidence of other crimes—this isn’t here. Why are these in here? Take this one out. This is No. 19. It says “reserved” on it. Please disregard that. The court was reading from proposed stipulated instruction number nineteen, which read:

You will hear evidence of other crimes wrongs or acts of

Mr. Schwartz. You may only consider that evidence as it bears on Mr. Schwartz [e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose. Of course, the fact that Mr. Schwartz may have previously committed an act similar to the one charged in this case does not mean that Mr. Schwartz necessarily committed the act charged in this case.

(v1, p655).

The defense moved for a mistrial (v3, p374)(tr. 10/7/14), stating, “I apologize, I didn’t want to interrupt you while you were reading the instructions.” Defense stated manifest injustice had occurred (v3, p376)(tr. 10/7/14). Defense counsel suggested that the individual jurors should be polled or the entire panel stricken. “It doesn’t matter whether one knows or all fourteen know, that he has been convicted of a felony, and that there’s a possibility he might be involved in some prior criminal acts. There’s no way to undo that, there’s no way to correct that, and there’s no way to know how the jury would use that in any way” (v3, p377)(tr. 10/7/14). The court ruled, “Is this sufficient that, as we say, you can’t unring a bell? I don’t think that it is. I think it’s a strong motion for mistrial, but I am going to deny it” (v3, p380)(tr. 10/7/14).

Brief Background of the Proceedings—Bad Character Evidence.

The onslaught of bad character evidence introduced by the government occurred after the defense asked the Defendant's wife three questions, "[a]nd so doing things right and doing things proper was very, very important to him" (v3, p1629)(tr. 10/16/14); and, "his reputation was very important to him? Keith took a lot of pride in his work?" (v3, p1630)(tr. 10/16/14); "And he would consult lawyers to make sure he knew what he was doing? (v3, p1632)(tr. 10/16/14).

Following defense examination, the government noted that it had filed a notice (Doc. 300) of their intent to impeach the Defendant with his felony "convictions." Representing that the Defendant had elicited evidence that Defendant always wanted "to follow the law," and mistakenly claiming the Defendant asserted his character trait of honesty," the prosecution asked the court for permission to ask Ms. Schwartz about specific instances of conduct; namely, Defendant's "commission of theft, two instances of insurance fraud, bankruptcy fraud, and distribution of marijuana" (v3, p1671-77)(tr. 10/16/14). The defense responded by stating the government had stipulated to all the emails in which Mr. Schwartz's defense was that he wanted to do things

right in terms of the business, and that the evidence from Ms. Schwartz was no different now and they did not open the door to a widespread character attack (v3, p1678-83)(tr. 10/16/14). The court stated it was going to admit all the evidence of prior misconduct with the instruction to the jury “this evidence is limited and its purpose is only for impeachment” (v3, p1689)(tr. 10/16/14). The court noted the initial misreading of the instructions relating to a felony conviction and prior misconduct and stated “this ties into that matter as well” (v3, p1690)(tr. 10/16/14). The court continued, “[c]an I un-ring a bell or unscramble an omelet? Perhaps not. But this is not a bell or an omelet” (v3, p1692)(tr. 10/16/14). The court stated, “But before the jury comes in, I will instruct the jury that they are about to hear evidence which is for a limited purpose and a limited purpose only” (v3, p1693)(tr. 10/16/14). Yet, the court did not provide the jury with the limiting instructions as promised.

Subsequently, the prosecution asked Ms. Schwartz a number of questions, which trashed the Defendant’s character: “How well did you know Mr. Schwartz before you married him? Did he ever tell you he was charged with grand larceny in West Palm Beach Florida for stealing

phones and selling the customer list? Did he ever tell you he was charged in a related case with an organized scheme to defraud for various—various charges around the cell phone business and reports to insurance? Did he ever tell you about a false insurance claim in Palm Beach Florida in 1996 where he had reported that phones had been stolen out of a van that he had really sold to people? Did he ever tell you about a bank fraud felony that he was charged with in 2001, that happened in West Palm Beach, Florida (v3, p1711-12)(tr. 10/16/14).” The witness was generally unaware of the accusations. Apparently, after this attack on Ms. Schwartz’ “credibility,” the crying witness left the stand, and the prosecutor hugged her in front of the jury while escorting her off the stand (v3, p1713-14)(tr. 10/16/14). The defense moved for another mistrial, which the court did not address.

Factual Background of *Res Gestae* Argument.

The government wished to introduce extensive evidence that while under Dr. Ferrara’s care, two patients died of overdoses. However, there was no allegation that required proof of death in this case, and the evidence was undisputed that the deaths were not caused by prescriptions issued by Dr. Ferrara. Even though there was no causal

link, the evidence of the deaths of PB and CL were a main feature and consumed the dialogue of the entire government's case. In the testimony of the very first witness, Karyne Smith, the government elicited that CL's treatment proceeded until "he died" (v3, p654)(tr. 10/8/14). The deaths of CL and PB were a large focus toward the end of the testimony of Karyne Smith to create the impression the Defendant was engaged in meticulous record keeping to cover some causal connection between Dr. Ferrara's treatment and the patients' demise (v3, p706, 742-757)(tr. 10/8/14). The government's critical expert witness, Dr. Philip Engen, testified that "opiate deaths" were a problem in the business (v3, p981)(tr. 10/14/14). He opined, permitting a clear inference that Dr. Ferrara's treatment was at fault, that patients taking over 120mg a day of opiates have an increased risk of mortality and morbidity, especially if opiates and benzodiazapenes are prescribed together (v3, p996-998)(tr. 10/14/14). The government's need to make the case mostly about PB and CL seemed compelled by the fact that the only medical records they supplied from the hundreds of patients were those of PB, CL, and RE (who overdosed on Fentanyl, which was not prescribed by Dr. Ferrara) (v3, p1029-35)(tr. 10/14/14).

In similar fashion, the other expert witness, Dr. Walter testified at great length about the treatment of PB, which ended with her death (v3, p1375-1393)(tr. 10/15/14). Similar to Dr. Engen, the primary reason explaining the focus on the deceased patients was that the DEA only gave the medical experts medical records of the deceased patients, and no one else (v3, p1431)(tr. 10/14/14). Defendant was forced to cross-examine both expert witnesses at length about these deaths that were not caused by the prescription practice.

In an especially lurid account, the government called Miles Heivilin, a City of Arvada Colorado Police Detective (v3, p1468)(tr. 10/15/14). He identified and presented to the jury a series of photos of PB lying in a sea of pills when he discovered her body (v3, p1470-97)(tr. 10/15/14).

Additional Facts will be added in the argument where necessary.

Discussion-Initial Instructions and Bad Character Evidence.

In the court of appeals majority opinion, the court of appeals noted that it has conflicting standards as to review of error when extraneous information is presented to the jury. *Compare United States v. Muessig*, 427

F.3d 856, 865 (10th Cir. 2005)(prejudice presumed unless exposure shown to be harmless) *with Smith v. Ingersoll-Rand*, 214 F.3d 1235, 1242(10th Cir. 2000)(reversal if there is the slightest possibility the exposure affected the verdict). The court declined to resolve the inconsistency. Opinion at page 7. This Court held over 70 years ago that the presentation of extraneous information to the jury is presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 228-229 (1954). However, other circuits have also swayed from this standard similarly to the Tenth. *See, e.g., Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000)(reasonable probability).

Petitioner asserts that aside from the postural novelty of this case involving a judge telling the jury at the outset of the trial the defendant has a prior felony conviction and engaged in prior misconduct and bad acts, this case presents a need to resolve a conflict within and amongst circuits as to the approach appellate courts should when addressing improper jury exposure. As recognized in the dissenting opinion, the timing of the instructions at the outset of the trial is critical, because first impressions are the most important to the jury and most likely to be absorbed. Dissent at p. 9-10(*citing, e.g.,* Lawrence S. Wrightsman, *The Place and Primacy in*

Persuading Jurors: Timing of Judge's Instructions and Impact of Opening Statements, 8 U. Bridgeport L. Rev. 431, 432 (1987); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 112 (1994)).

Petitioner also contended that these instructions stripped Mr. Schwartz of his right to be presumed innocent, which would constitute a “structural error,” requiring reversal without inquiry into harmlessness—an argument that was dispatched in a footnote. Opinion at p. 8, n. 3. A “structural error” is one that undermines the entire framework or process of a trial so that the defendant is deprived of basic protections. *Sullivan v. Louisiana*, 508 U.S. 275, 280-282 (1993). In denying the motion, the court expressed doubt that it could not “unring the bell” on the prior felony and prior bad acts or criminality statements. This conclusion establishes that the court understood it **did** ring the bell. The court took little care in un-ringing the bell, stating only briefly, this should not be in there and “disregard that.” Such ambivalent admonitions do not un-ring the chime of prior misconduct, bad acts, and felony conduct to an impressionable jury at the very outset of a criminal trial. By failing to impanel a new jury, the trial

court assured that this Defendant was stripped of the presumption of innocence.

Wherefore, this instructional issue exposed the jury to extraneous information that was not curable by instruction. It is respectfully requested that this Court exercise its jurisdiction to harmonize discrepancies in the lower circuits regarding juror exposure to extraneous information. Petitioner also contends that this is an important question of federal law in which the lower court deviated from previous decisions of this Court.

In failing to correct the impact of the government's presentation of waves of bad character evidence to "impeach" Petitioner's wife by demonstrating she did not know him well, the Tenth Circuit Court of Appeals violated the dictates of *Huddleston v. United States*, 485 U.S. 681, 691 (1988). The dissenting opinion recognized this problem. Dissent at p. 12-13. In *Huddleston*, this Court reasoned that admission of bad conduct evidence must be probative of a specific limited purpose such as, *inter alia*, motive, intent, or knowledge, to be admissible. In this case, not only was no legitimate purpose identified for the admission of said evidence, the government was permitted *carte blanche* to drag Mr. Schwartz in a slurry of mere allegations of improper activity without any proof or backing.

Combined with the trial court initial instructions that these facts existed, these allegations had enhanced credibility.

The majority opinion dismisses the prejudicial nature of this evidence by following its precedent that 404(b) challenges do not apply to “impeachment evidence.” Opinion at p.14. The problem with this conclusion is that the trial court never instructed the jury the evidence was simply for impeachment; therefore, the jury was free to consider the evidence for any purpose it wished.

Petitioner contends that this Court should exercise certiorari jurisdiction to reconcile the lower court’s holding with prior decisions of this Court on this important federal question involving application of the rules of evidence.

Discussion-*Res Gestae*.

The testimony and evidence of the “deaths” unfairly tainted the trial in which the allegations required no proof of a death. The trial court and the circuit court of appeal ruled that this evidence was “*res gestae*.” The common law notion and arcane notion of *res gestae* should be abandoned in lieu of the modern and application of the Rules of

Evidence, which enhance the truth-seeking function of a trial by promoting an orderly analysis of admissibility of evidence. The concept of *res gestae* emasculates the rules of evidence according to observations of judges of the Tenth Circuit, scholars, and holdings of other courts. The intrinsic/extrinsic analysis “elucidates little.” *United States v. Green*, 617 F.3d 233, 246 (3rd Cir. 2010)(citing *United States v. Cross*, 308 F.3d 308, 320 (3rd Cir 2002)). “The test is unhelpfully vague.” *United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2008). The formulations of the analysis are circular. *United States v. Bowie*, 232 F.3d 923, 928 (D.C.Cir. 2000). The inextricably intertwined test for admissibility is “defunct.” *United States v. Vargas*, 689 F.3d 867, 873-874 (7th Cir. 2012)(citing *United States v. Gorman*, 623 F.3d 711, 719 (7th Cir. 2010)). The analysis is elastic and “invites abuse.” 1

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, §4.33 (2003). Whether evidence “completes the story” does not satisfy modern application of the rules of evidence in a criminal trial such as this by overriding F.R.E. Rules 404(b) and 403’s prejudice prong. *Bowie, supra*. By simply “completing the story,” or explaining circumstances, it is hard to see how such evidence could pass the minimal requirements for

relevance. *Id.* In addition to the Tenth Circuit Court of Appeals' Judges, other courts in within the district have called the entire doctrine into question. *See United States v. Jahani*, 2014 U.S. Dist. LEXIS 72453 (D. Colo. 2014). Given the great weight of recent case and scholarly observations, the doctrine of intrinsic evidence should now be abandoned.

Accordingly, the evidence of "other deaths" should not have been part of the mix of evidence adduced at the Petitioner's trial. The evidence was unnecessary and unfairly tainted the jury, creating the improper impression that the overall practice of Dr. Ferrara caused death. While the jury was instructed by the court, the deaths were not admissible to prove death, this instruction was a meaningless exercise in futility since death was not an element of any charge before the jury.

Wherefore, this Court should exercise its supervisory authority and jurisdiction on certiorari to resolve this important federal issue involving proper application of the Rule of Evidence.

Discussion-Sentencing under the Federal Sentencing Guidelines.

As recognized by the Food and Drug Administration:

“Over the course of a given year, approximately 100 million people in the United States suffer from pain. Some 9 million to 12 million of them have chronic or persistent pain, while the remainder have short-term pain from injuries, illnesses, or medical procedures. All of them should benefit from skillful and appropriate pain management, which may include the judicious use of opioid medicines in conjunction with other methods of treatment or in circumstances in which nonaddictive therapies are insufficient to control pain.

As physicians, we have treated both the intense suffering caused by acute pain and chronic pain with all its exhausting and debilitating consequences. But we have also witnessed the devastating results of opioid misuse and abuse, such as the addiction of patients who have been prescribed opioids for pain treatment and, increasingly, diversion to people for whom the prescription was not written. Many Americans are now addicted to prescription opioids, and the number of deaths due to prescription opioid overdose is unacceptable. This past month, our sister agency, the Centers for Disease Control and Prevention (CDC), estimated that in 2014 there were almost 19,000 overdose deaths in the

United States associated with prescription opioids (Rudd R, CDC: personal communication).” Robert M. Califf, M.D., Janet Woodcock, M.D., Stephen Ostroff, M.D., *A Proactive Response to Opioid Abuse*, 374 N.E. Journal of Medicine, 1480 (April 14, 2016).

The trial court found all 500,000 doses were illegal. However, a court imposing a sentence in a conspiracy to illicitly dispense pharmaceutical drugs must determine which prescriptions were legitimate and which were not. *United States v. Chube*, 538 F.3d 693, 704-705 (7th Cir. 2007). Certiorari review in this case is important to provide lower courts with needed guidance in accord with *Chube*, because some opioid prescriptions are valid in order to help people who suffer from chronic pain while others may be invalid, contributing illegally to improper opioid addiction.

Conclusion

Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Dated: December 8, 2017

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Certificate of Compliance

I hereby certify that this Petition complies with the word count limit set by Supreme Court Rule 33(i) and specifically contains 5539 words. I used my Microsoft Office Word program to determine the word count. I further certify that the Petition has been scanned for viruses and malware using the McAfee Security System installed on my computer.

s/ Jonathan S. Willett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served by depositing a true and correct copy of the Petition in the United States Mail on December 9, 2017 to:

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